91-1900

In the Supreme Court of the United States

October Term 1992

No. ____

Supreme Court, U.S.
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ROBERT ALEXANDER,

Petitioner,

-v-

CITY OF MENLO PARK,
MIKE BEDWELL,
Manager of City
of Menlo Park,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Submitted By

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I. QUESTIONS PRESENTED.

1. Was plaintiff's termination a proper one, or was he terminated without being afforded certain entitlements arising out of the personnel rules without due process?

2. Did the Court err in cutting off plaintiff's economic loss as of the date he voluntarily resigned (albeit for good cause--health reasons) from a subsequently obtained job?

3. Did the Court err in refusing to order reinstatement, front pay in lieu of reinstatement, vocational rehabilitation, and/or any other type of equitable relief to plaintiff?

4. If an employee loses his employment because of a denial of due process, under what circumstances is he entitled to receive emotional distress damages to compensate him for (a) the emotional distress he suffered as a result of the loss of his employment, (b) the emotional distress he suffered as a result of the publicity arising out of the employment dispute and (c) the emotional distress arising out of his attempt to seek legal redress of the

violation of his due process rights?

5. What computational methodology should be used to determine prejudgment interest owing on economic loss in a 42 U.S.C. Section 1983 case?

6. Did plaintiff abandon his right to seek punitive damages against the City Manager, and was he entitled to receive them?

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Petitioner, Robert Alexander, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed on December 13, 1992, with rehearing denied on February 25, 1992.

OPINIONS BELOW

The Court of Appeals' last opinion in this case (unpublished), hereinafter referred to as "Alexander II", was filed on December 13, 1991. The Order overruling petitioner's Petition for Rehearing was filed on February 25, 1992. (See Appendix.)

The first Court of Appeals' opinion in this case, was published as Alexander v. City of Menlo Park, 787 F.2d 1371 (9th Cir. 1986), cert. den. 479 U.S. 1032, 107 S.Ct. 879, 93 L.Ed.2d 833 (1987), and is hereinafter referred to as "Alexander I".

Opinions of the trial court prior to the first appeal and remand order were: 1) Decision filed July 23, 1982; 2) Judgment entered July 28, 1982; 3) Memorandum of Decision dated July 28, 1983; 4) Judgment entered June 14, 1984.

Opinions of the trial court after the first appeal and remand were: 1) Order filed September 13, 1988; 2) Memorandum of Decision filed August 2, 1989; 3) Judgment entered August 4, 1989; 4) Findings of Fact and Conclusions of Law filed March 29, 1989; 5) Judgment Amending Judgment Entered August 4, 1989, filed April 25, 1989; 6) Findings of Fact Amending Findings Filed March 29, 1990, filed May 7, 1990; 7) Amended Findings of Fact and Conclusions of Law filed July 20, 1990; 8) Amended Order filed August 1, 1990. (See Appendix.)

JURISDICTION

The opinion of the Court of Appeals was entered December 13, 1991. A timely petition for rehearing was denied on February 24, 1992. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS

The statutes involved are 42 U.S.C. Section 1983 and 28 U.S.C. Section 1961. The Constitutional provision involved is the Due Process Clause. The regulations involved are pertinent rules contained in the Personnel Rules

of Menlo Park. (See appendix.)

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Plaintiff, an African-American citizen of the United States, veteran of the armed services, and holder of a master's degree from San Francisco State University, worked for the City of Menlo Park, California, between November 1974 and August 5, 1979. Between November 1974 and February 1979 he held the position of Youth Services Facility Director. He passed his probationary period on May 7, 1975, and thereafter throughout the rest of his employment had permanent employment status.

He performed the duties of Youth Services Facility Director in an excellent fashion, receiving repeated raises, upward classification to classification 39.5, and favorable evaluations from his supervisors and the City Manager, Michael Bedwell.

Effective February 9, 1979, the City of Menlo Park promoted plaintiff to Recreation Supervisor II, after abolishing his Youth Services Facility Director position. He was put

in a six-month probationary promotional status in the new position, but retained permanent employment status and retreat, bumping, and re-employment rights in the event he did not pass the probationary period of the promotional position.

On July 9, 1979, plaintiff's supervisor, Mary Leydon, recommended to City Manager Bedwell that plaintiff be terminated from the probationary promotional position. She wrote, "At this point, I think it would be best to terminate Robert from this position, and lay him off under the Personnel Rules which apply to bumping, since there are no other jobs in this department that are available to him. As a department head, I will not go to any special lengths to 'save' him and bump another employee." Leydon's recommendation to lay plaintiff off and disregard his bumping rights (which she admitted in testimony she knew he had) followed a noticeable cooling in the relationship between Leydon (a Caucasian) and plaintiff after plaintiff had opposed provisions in a proposed affirmative action plan (drafted

by Leydon), which stated there was an overutilization of Black males in the workforce.

Plaintiff was immediately suspended with pay, and on July 30, 1979, City Manager Bedwell wrote plaintiff and informed him, "Your position as Recreation Supervisor II is terminated as of August 5, 1979, and until that time you will be suspended without pay."

Plaintiff was denied his retreat rights, bumping rights, and re-employment preference eligibility list rights despite the clear requirement in Menlo Park's rules requiring such rights be offered a promotional probationary employee of permanent status. Instead of giving plaintiff these rights, plaintiff was terminated August 5, 1979 from his employment in toto with Menlo Park. Plaintiff was given no explanation for being terminated from Menlo Park employment in toto; nor was he given any explanation for not being afforded retreat rights, bumping rights, and re-employment rights; nor was he given any opportunity to have a hearing to address these issues. Plaintiff previously had repeatedly inquired about his bumping rights and

hearing rights to no avail.

At trial, City Manager Bedwell admitted he had intentionally denied plaintiff his entitlement to bumping rights, and that the City had disregarded the requirement of putting plaintiff on a re-employment eligibility list.

The evidence both before and after remand established that plaintiff was a highly qualified employee, who should have been given bumping rights, and who would have been eligible for priority placement if he had been put on the re-employment eligibility list. The positions plaintiff would have been eligible for if he had been put on the re-employment eligibility list would have included the position of Human Services Coordinator which became available in May 1980. Under Rule X's re-employment preference eligibility list requirement, plaintiff should have been hired for any position opening up in the ensuing two years after being laid off for which he was qualified (including Human Services Coordinator).

In addition to denying plaintiff his bumping rights and re-employment preference

eligibility list rights (Rule X, Section 3(D), 3(E), 3(F), and 3(G), the City of Menlo Park violated numerous other personnel rules in effectuating the termination of plaintiff from both his promotional probationary position and from his permanent employment status with the City of Menlo Park, including as follows: 1) Rule V, Section 1--not attempting to secure the most effective adjustment of plaintiff to the probationary promotional position of Recreation Superviosr II; 2) Rule V, Section 2--failure to give plaintiff a full six month's probationary period in the new position, and failure to extend plaintiff's probationary period as Recreation Supervisor II an additional six months, despite "good cause" for such extension as defined in the rule; 3) Rule V, Section 4--failure to notify plaintiff of the specific reasons he had been rejected for the permanent position of Recreation Supervisor II, and failure to return plaintiff to his prior classification and non-probationary status in that classification; 4) Rule X, Section 2 and Rule XI, Sections 1 and 2--failure to follow

correct procedures for discharging plaintiff from employment in toto with the City; 5) Rule X, Section 3(E)--failure to retain plaintiff in the highest position possible after deciding his promotional probationary position would not work out; 6) Rule X, Section 3(G)--failure to pay plaintiff two weeks severance pay; 7) Rule VII, Section 1--failure to adequately train plaintiff in the promotional probationary position of Recreation Supervisor II; and 8) Rule VIII, Section 3--failure to give plaintiff any performance appraisals after 1977 (including none in his probationary period).

After being terminated plaintiff diligently looked for alternative work. He remained unemployed from August 1979 to April 1, 1983. Between April 1, 1983 and March 1984 he worked as Superintendent of Ravenswood Parks and Recreation District, which evolved into being Director of Parks and Recreation for the City of East Palo Alto.

In March 1984, plaintiff resigned his East Palo Alto Director position, based on extreme distress he was suffering. Unrebutted expert

testimony from a psychiatrist and psychologist established plaintiff has suffered ongoing severe emotional distress, partial disability, and post-traumatic stress syndrome arising out of the denial of his due process rights, which distress continues up through the present time.

The unrebutted testimony was that plaintiff's distress was exacerbated by newspaper publicity about the litigation and about his involuntary separation from Menlo Park employment, and by repeated interaction with the City of Menlo Park in his East Palo Alto director job (a requirement of the job), revivifying the original trauma, and leading him to resign from the East Palo Alto Director job.

After leaving the East Palo Alto Director job plaintiff worked on an independent contractor consultant assignment for East Palo Alto for a pre-set specified time period between July 1984 and the end of 1984. This assignment did not require close interaction with Menlo Park officials. The only work plaintiff has had between the end of 1984 and the present was some independent contracting work he did for Bayshore

Employment Services in 1986.

II. PROCEDURAL HISTORY AND DECISIONS IN CASE

After the first trial in this case, the trial court on July 23, 1982, granted plaintiff relief under 42 U.S.C. Section 1983, holding that, "plaintiff was denied procedural due process of law...because the defendant failed to accord him all that was due him" under the personnel rules. (Para. 9.) It ruled that when plaintiff was terminated from his promotional probationary position under City rules he "...had a right to be returned to classification 39.5 (his previous classification when he was Youth Services Facility Director), and if there was no available job for which plaintiff was qualified within that classification he should have been accorded the benefits of Rule X, as a permanent employee." (Para. 12.) Rule X covers rights for employees designated for layoff and for permanent employees retreating from promotional probationary positions, and addresses bumping rights and re-employment preference rights. (See Rule X in appendix.) The trial court entered judgment in favor of

plaintiff for back pay, based on the denial of bumping rights, in the amount of $11,114.03. (Judgment entered 7-28-82.)

Thereafter, the trial court vacated its damage award, held a new trial on damages, and then issued a memorandum of decision on July 28, 1983, reducing the dammage award to one dollar ($1.00). The Court held that plaintiff had suffered no "compensable injury", because he had not proven by a preponderance of the evidence he would have accepted the position of Gym Director or Night Clerk (positions the trial court had found he was entitled to bump into) if either position had been offered him in August 1979. (Memorandum of Decision, July 28, 1983.)

On appeal, in Alexander I, supra, the Ninth Circuit held that the trial court had improperly imposed the burden of proof on plaintiff on the issue of whether he would have accepted the bumped position instead of on the defendants. It also held that it was error to omit making any finding as to whether plaintiff had suffered emotional distress as a result of the denial of his due process rights.

In its opinion, the Ninth Circuit stated that, "The injury suffered by plaintiff was unemployment", and that plaintiff had a constitutionally protected property interest. The Ninth Circuit held that the weight of this property interest was "substantial--Alexander's opportunity to continue his employment, maintain his income, and protect his reputation." (Alexander I, supra, 787 F.2d at 1374.)

After remand, the trial court held additional trial proceedings, in which a significant amount of additional testimony was taken, and additional exhibits were admitted.

On September 13, 1988, the trial court issued an interim order. It stated, "The issues tried are (1) whether defendants sustained their burden of proof that plaintiff incurred no injury proximately resulting from a violation by defendant of his due process rights, and (2) whether plaintiff suffered emotional distress as a result of the denial of defendants of his due process rights?" The Court concluded, "Plaintiff is entitled to prevail upon both issues."

After hearing additional evidence on damages, the Court, on August 2, 1989, issued a memorandum awarding plaintiff $44,551 salary loss, $100,000 emotional distress damages, $3,684.00 for therapy bills, and $10,000 for vocational training. On August 4, 1989, judgment was entered for $158,236.41.

On March 29, 1990, the Court amended its judgment and issued findings of fact and conclusions of law. On April 25, 1990, the Court issued an amended judgment, and on May 7, 1990, filed findings of fact amending the March 29 findings. On July 20, 1990, the Court issued its final amended findings of fact and conclusions of law; and on August 1, 1990 it issued an order affirming its April 25, 1990 judgment as the final judgment. (See appendix.)

In its final amended findings of fact, the Court held that, "Plaintiff's claim for damages now before the court does not arise from wrongful termination of plaintiff's employment with defendant. It has been previously determined that plaintiff's termination from employment was not wrongful. [Decision of July

23, 1982; Alexander v. Menlo Park, 787 F.2d 1371.]" (7-20-90 amended findings, 3:10-14.)

The Court failed to explain how it concluded plaintiff had not suffered "wrongful termination", but had suffered wrongful denial of bumping rights which, if accorded to him, would have resulted in him not being terminated from his employment.

In its final amended findings, the Court awarded plaintiff $52,120 salary and fringe benefit loss at Gym Director level for the period August 1, 1979 through March 31, 1983, $55,282 prejudgment interest thereon, $10,000 emotional distress damages, $4,114.53 for past medical and psychological bills, and $960.00 for future medical and psychological bills. The Court did not award any vocational training money or reinstatement or front pay. (7-20-90 findings, finding no. 7.)

The total final judgment came to $122,476.53, plus attorneys' fees and costs. (April 25, 1990 judgment amending judgment.)

The trial court cut off plaintiff's economic loss at March 31, 1983, based on its

view that "Plaintiff's unemployment and alleged wage losses after March 31, 1983 were not caused by and did not proximately result from the denial of bumping rights or other act of defendant, but rather from plaintiff's voluntary resignation from his East Palo Alto job"). (7-20-90 amended findings, finding no. 9.) The trial court concluded in its amended findings that plaintiff resigned the Ravenswood/East Palo Alto job because of (1) "a decision of this court" (the August 1989 memorandum had stated "because he was overwhelmed by a decision of this court which awarded him token damages of $1.00"), and (2) "plaintiff's inability to tolerate contact with officials of defendant City (of Menlo Park), as he was required to do in the Ravenswood job" (the August 1989 memorandum had explained that, "His reason for resigning was that his post brought him into contact with City of Menlo Park personnel, which reminded him of his denial of due process by the City of Menlo Park."). (7-20-90 amended findings, finding no. 24; August 1989 memo., 3:7-16.)

The trial court made no finding whether plaintiff had good cause to resign the East Palo Alto director job or not. The unrebutted expert testimony was that the severe distress plaintiff was experiencing at the time mandated he resign from the Ravenswood/East Palo Alto job. The Court's memoranda and findings--indicating plaintiff's inability to tolerate contact with officials of Menlo Park as required by his East Palo Alto job and his being overwhelmed by the $1.00 decision as being the factors causing him to resign--implicitly accepts this view that severe emotional distress caused him to resign from the East Palo Alto job.

In its March 1990 and July 1990 amended findings, the trial court reduced its previous August 1989 award of $100,000 damages for emotional distress to $10,000, based on its view that 10% of plaintiff's $100,000 of emotional distreess was from "loss of bumping rights", 60% was from "termination of employment" with Menlo Park, and 30% was from "reaction to publicity and judicial decisions" pertaining to his employment dispute with Menlo Park. The trial

court held that only the 10% ascribed to "loss of bumping rights" was compensable, based on proximate cause principles. (7-20-90 amended findings, findings 26-33.)

In its March 29, 1990 findings the trial court found that plaintiff had been denied his right to be put on a re-employment preference eligibility list, although it stated he had not proved he had been damaged therefrom. (Findings 5,6,7.) By amendment, on May 3, 1990, the trial court deleted all findings on the re-employment preference list issue, without stating its reasons therefor, and its July 1990 amended findings reflected the deletion.

The trial court also found in its final March 1990 and July 1990 findings that plaintiff was not entitled to reinstatement/front pay/vocational training, holding that his right to reinstatement/front pay/vocational training had been cut off based on his resigning the East Palo Alto job in 1984. This finding was a reversal from its August 1989 memorandum of opinion which had awarded $10,000 for vocational training "in lieu of reinstatement". (See 7-20-

90 amended findings, conclusion of law no. 14.)

The Court of Appeals for the Ninth Circuit issued its unpublished decision on December 13, 1991. The Court affirmed the trial court's judgment. It held that plaintiff's resignation from his subsequent job was "causally unrelated to the failure to offer Alexander bumping rights", although it was causally related to Alexander's termination from employment by Menlo Park. However, it held that because Menlo Park's termination of him was a "proper termination", economic loss occurring after his resignation from the East Palo Alto Director job (although causally related to his termination by Menlo Park) was not recoverable.

The Court of Appeals also affirmed the trial court's decision and reasoning with regard to reducing the emotional distress award from $100,000 to $10,000.

The Court of Appeals also ruled that plaintiff had "abandoned' his claim to the re-employment eligibility list, even though plaintiff had raised the issue in his complaint, in the trial before the first appeal, in the

first appeal, at the evidentiary hearings after the first appeal, and in the second appeal, and even though the trial judge had taken considerable evidence on it and made a finding on it after the second appeal before deleting the finding.

The Court of Appeals also affirmed the trial court's denial of reinstatement and vocational rehabilitation relief, holding that plaintiff had not raised these issues in the first appeal, and had accordingly abandoned them, even though the trial court after remand after the first appeal, upon re-trial, had made findings of fact and conclusions of law on the issues, and had taken considerable new evidence germane to said issues. The Court of Appeals ignored, as well, the fact that reinstatement and other equitable remedies had become very germane in the intervening period between the first appeal and second appeal because plaintiff had experienced considerable unemployment during that period of time.

The Court of Appeals also affirmed the award of prejudgment interest the trial court

had made, indicating that the trial court had not abused its discretion in using a rate lower than the 28 U.S.C. Section 1961 methodology used for post-judgment interest computations.

As for punitive damages, the Court of Appeal ruled that judgment was initially rendered only against the City of Menlo Park and not against Mike Bedwell. It stated that this aspect of the judgment was not challenged in the first appeal.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY RULED THAT PLAINTIFF'S TERMINATION WAS "PROPER", WHEN IN FACT PLAINTIFF WAS TERMINATED WITHOUT DUE PROCESS.

A. INTRODUCTION

The trial court, after remand, and the Court of Appeals in Alexander II, both ruled that although plaintiff had been wrongfully denied bumping rights, and suffered economic and emotional distress damages flowing therefrom, "his termination from employment was not wrongful" and was "proper", and accordingly, certain economic and emotional distress damages flowing from his termination from employment were not recoverable.

However, plaintiff's termination from his

Menlo Park employment was not "proper", but rather was in violation of due process. Accordingly, the damages the Court of Appeals ruled were caused by the termination should have been awarded him in this action.

B. PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED, RESULTING IN AN IMPROPER TERMINATION

A federal constitutional claim for improper termination in violation of due process depends on a plaintiff establishing that (1) he had a property interest pertaining to continuing employment, and (2) that he was deprived of that property interest without due process. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

In Perry v. Sindermann, id., 92 S.Ct., at 2699, the Supreme Court stated that, "'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather 'property'

denotes a broad range of interests that are secured by 'existing rules or understandings'. (Citation.) A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit..."

The personnel rules of the City of Menlo Park create a number of entitlements of benefits to a permanent employee working for the City of Menlo Park. These entitlements include a property interest in continuing employment and job security. (See Rule X, Section 2, and Rule 11.) These entitlements also included as part of that property interest in continuing employment and job security, a property interest in bumping rights, in re-employment preference rights, in retreat rights, and in certain procedural protections which in and of themselves provide legitimate claims of entitlement to benefits pertaining to a continuing property interest and job security.

The Court of Appeals failed to thoroughly review these personnel rules and make

determinations of entitlements (property interests) which Alexander had arising from them. As a result, the Court of Appeals erroneously concluded the termination was "proper", when in fact plaintiff was terminated improperly in violation of his due process rights.

In Cleveland Bd of Education v. Loudermill, supra, the Supreme Court held that if a public employee has a property interest in continued employment, he cannot be terminated from employment without first being given certain pre-termination due process procedures, or else the termination is improper.

In Loudermill, id., the Court focused on the employee's pretermination due process right to be given notice and an opportunity to respond to charges on which the termination action was being based.

In the instant case, plaintiff was denied the pretermination due process rights addressed in Loudermill, along with the additional pretermination due process rights of bumping rights, re-employment preference eligibility

list rights, and retreat rights. Furthermore, he was denied the protection of certain personnel rules of Menlo Park, the purpose of which was to enhance his job security and to put limitations on, and set up guidelines as to, the exercise of the City's discretion in deciding whether to impair his job security.

Accordingly his termination was improper and in violation of due process.

1. REASON NO. 1 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF RECEIVED NO NOTICE OF CHARGES OR OPPORTUNITY TO BE HEARD BEFORE BEING TERMINATED FROM EMPLOYMENT IN TOTO

Menlo Park terminated plaintiff from his employment in toto, despite his permanent status, and without giving him notice of the reasons for terminating him in toto or an opportunity to rebut the unknown reasons.

The trial court found that, "Rule V, Section 4, of Ex. 4 (personnel rules) provides that if a probationary employee is deemed unsatisfactory for the probationary position such employee shall 'return to prior classification and non-probationary status in that classification to the pay step he/she would

have had if not promoted.....Therefore, plaintiff had a right to be returned to classification 39.5, and if there was no available job for which plaintiff was qualified within that classification he should have been accorded the benefits of Rule X, as a permanent employee."

Rule X provides that an employee whose job has been abolished has certain retreat rights to the highest possible position, certain bumping rights, and certain re-employment preference eligibility rights. It also provides that if an employee is going to discharged from employment in toto, he must be given notice of the reasons for the proposed discharge. (Rule X, Sec. 2.)

Instead of giving plaintiff his Rule X rights, and instead of giving him notice and explaining the reasons for the proposed discharge from employment in toto, plaintiff was simply terminated from employment in toto without explanation and without an opportunity to address the unknown reasons for the action.

In Alexander I, the Ninth Circuit indicated that there was no administrative appeal

available to Alexander because the personnel rules "did not permit an appeal from a failure of probation, a layoff, or an informal discharge."

However, as noted in Loudermill, the process due is not prescribed by local personnel rules or state law, but by federal requirements. Since Alexander was a permanent employee (albeit in a promotional probationary position), and had a property interest in continuing employment, he could not be deprived of that property interest in continuing employment, i.e., terminated, without being afforded predeprivation due process requirements of notice and an opportunity to be heard. In this regard, the due process violation was clear--he was not even told the reasons he was being terminated from employment in toto, let alone given an opportunity to reply. Accordingly, under Loudermill, the termination was clearly improper and in violation of due process.

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2. REASON NO. 2 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF WAS DENIED BUMPING RIGHTS, CAUSING HIM TO BE TERMINATED IMPROPERLY FROM EMPLOYMENT IN TOTO

In our case, plaintiff had a legitimate claim of entitlement (property interest) to bumping rights under Menlo Park's rules, which the Court of Appeals affirmed in Alexander I.

The failure to give Alexander notice and an opportunity to be heard regarding denial of those bumping rights was a predeprivation denial of due process and rendered the termination from employment (not just the denial of bumping rights) improper.

In Alexander I, the Court held that "The injury suffered by plaintiff was unemployment", because of the denial of bumping rights. The Court indicated it viewed the property interest afforded by bumping as "substantial--Alexander's opportunity to continue his employment, maintain his income, and protect his reputation." Thus, the bumping rights were thought of as part of the property right to continuing employment. The clear implication is that a termination from that continuing employment without being

afforded bumping rights would be an improper termination, and that the bumping rights could not just be looked at as an insulated, separate right divorced from the right to continuing employment with the employer.

In this same light, in Gabe v. County of Clark, 701 F.2d 102 (9th Cir. 1983), it was held that plaintiff's "legitimate claim of entitlement to continued job security" included priority consideration for lateral transfer to another county job.

In McGraw v. City of Huntington Beach, 882 F.2d 384 (9th Cir. 1989), the Ninth Circuit ruled that a promotional probationary municipal employee had a property interest in continued employment which he/she could not be deprived of without being afforded certain bumping rights. The Court held that McGraw had been improperly terminated when she was denied these bumping rights. (See also, Sanchez v. County of Santa Ana, 915 F.2d 424 (9th Cir. 1990).)

Based on the aforesaid, the denial of bumping rights to Alexander was a predeprivation due process violation, which rendered the

termination improper. Plaintiff would never have been terminated if he had been given his bumping rights.

3. REASON NO. 3 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF WAS DEPRIVED OF HIS PROPERTY INTEREST IN RE-EMPLOYMENT PREFERENCE ELIGIBILITY RIGHTS

Under Rule X of Menlo Park's personnel rules, an employee with permanent status who was laid off (such as Alexander purportedly was after not passing his probationary period in the promotional position) had to be given re-employment preference rights for a period of two years, by being put on an eligibility preference list.

In Allen v. City of Beverly Hills, 911 F.2d 367 (9th Cir. 1990), the Court recognized both bumping rights and re-employment preference eligibility rights as rights which were legitimate claims of entitlement which an employee could not be deprived of without due process.

Alexander would have to be given notice and an opportunity to be heard before being deprived of his entitlement of being put on the re-

employment prefernece eligibility list. Accord, Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122 (3rd Cir. 1985) [employee had a sufficient legitimate claim of entitlement to her place on the eligibility list so that she could not be deprived of it without due process).

Several cases in other circuits have taken a different view from Stana and Allen, and held that eligibility lists are not protected property interests afforded procedural due process protection. (See Hermes v. Hein, 742 F.2d 350 (7th Cir. 1984) [alleged unwritten rule on eligibility list was not in force throughout the department); Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir.) cert. den. 449 U.S. 893, 101 S.Ct. 256 (1980) (no property interest in eligibility list for promotions).)

The case herein, however, is distinguishable. What is at stake is deprivation of part of an ongoing property right to continuing employment (maintenance of job security). In Hermes, supra, and Burns, supra, the employees were denied a promotion, but they

did not lose their employment in toto with the public entity. However, in our case, because of the denial of his re-employment rights (and bumping rights), Alexander suffered complete unemployment--his property interest in continuing employment (which property interest included absolute entitlements to bumping rights and re-employment rights as an alternative to termination). (See also, Gabe v. County of Clark, 701 F.2d 102 (1983), [county employer committed a "wrongful termination" against employee when it terminated her and deprived employee of her "legitimate claim of entitlement to continued job security as a County employee" without due process; the property interest of "continued job security as a County employee" included a right to priority consideration for lateral transfer to other positions, which right had been denied her.])

4. REASON NO. 4 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF WAS DENIED RETREAT RIGHTS, CAUSING HIM TO BE TERMINATED IMPROPERLY FROM EMPLOYMENT IN TOTO

Under Rule V, the trial court recognized that Alexander after not passing probation in

the promotional probationary position had an absolute entitlement to return to "prior classification and non-probationary status in that classification to the pay step he/she would have had if not promoted." (7-23-82 decision.)

Under Rule X, Section 3(E), "A retreating employee has a right to be retained in the highest salary range possible which is equal to or less than his or her present salary range."

Alexander was denied his retreat rights, was not returned to classification 39.5, and was not given any reason why he was not being returned to classification 39.5.

If there was no position available in classification 39.5, Alexander should have been given an opportunity for a hearing on the issue and a hearing on the issue of what type of retreat rights he would have thereafter. The retreat rights he would have had thereafter were defined under Rule X. They would have included bumping rights and re-employment eligibility preference rights (Rule X[3][D]),[F],[G],[H]). Furthermore, there was a requirement that Alexander, as a retreating employee, be retained

in the highest level position possible, under Rule X(3)(E).

If Alexander had been given his retreat rights under Rule V and Rule X, he would not have been terminated. The termination was accordingly improper, and in violation of his due process rights.

5. REASON NO. 5 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF HAD A PROPERTY INTEREST IN CERTAIN PROCEDURES, THE PROTECTION OF WHICH HE WAS DEPRIVED WITHOUT DUE PROCESS, AND WHICH DENIAL RESULTED IN AN IMPROPER TERMINATION

Local personnel rules do not define the process due once a property interest is established. Rather, what process is due is a federal due process requirement based on a balancing test involving the weight of the private property interest affected by the official action, the risk the procedures used will erroneously deprive that interest as well as the probable value of other procedures, and the fiscal or administrative burdens that other procedures would entail. (See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Alexander I, supra, at 1374;

Cleveland Bd. of Educ. v. Loudermill, supra; Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982).)

However, personnel rules which set forth procedural requirements which provide significant restrictions on the decision-maker or articulable standards to guide his discretion establish a Fourteenth Amendment property interest in and of themselves, and an employee cannot be deprived of their protection without due process. (See Clemente v. United States, 766 F.2d 1358, 1364-65 (9th Cir. 1985); Dube v. State University of New York, 900 F.2d 587 (2nd Cir. 1990); Hogue v. Clinton, 791 F.2d 1318 (8th Cir. 1986); Parks v. Watson, 716 F.2d 646, 657-57 (9th Cir. 1983); Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980);).[1]

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[1]Some circuit courts appear to disagree and take the position that personnel rules setting forth procedural requirements can never rise to the level of a property interest. (See, Wells Fargo Armored Serv. v. Georgia Public Service Commission, 547 F.2d 938, 942 (5th Cir. 1977); Lake Michigan College Federation of Teacher v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975); Siu v. Johnson, 748 F.2d 283 (4 Cir. 1984)[concept of property interest in procedures is "circular" and "conceptually unacceptable"). However, other circuit courts g further than Dube, supra, and Clemente, supra, c

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Defendant Menlo Park violated a number of personnel rules which were clearly designed to provide significant restrictions on the decision-maker and/or articulable standards to guide its discretion in deciding to terminate employees. The rules on bumping, re-employment priority, and retreat rights, have already been discussed. In addition, the following rules would appear to have risen to an entitlement level in connection with providing job security protection to plaintiff--1) Rule VIII, Section 3, requiring performance evlauations (there were none done--performance evaluations are meant to provide an articulable guideline to a decision-maker as to an employee's performance and to restrict his unfettered discretion to state an

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the other side, and appear to take the position that procedural personnel rules as a matter of law define the due process due (at least to the extent they don't provide less process due than federal requirements), especially if the procedures pertain to protecting job security. (See, e.g., Skeehan v. Board of Trustees, 590 F.2d 470, 485 (3rd Cir. 1978); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976); see also, Burnaman v. Bay City ISD, 445 F.Supp. 927 (S.D. Texas 1978).) This case offers an opportunity for the Supreme Court to clarify this conflict among the circuit courts as to when, if ever, the protections provided by certain personnel rules rise to the level of being a property interest--a legal claim of entitlement.

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employee is not doing well [when the evaluation shows the opposite].) 2) Rule V, Section 2--providing for extension of the probationary period for good cause (good cause is defined). 3) Rule VII--requirement that adequate training be given to a probationary employee.

Plaintiff had a property interest in all these rules, because they limited the discretion of the decision-maker and provided articulable standards to guide a decision-maker's discretion. Defendant Menlo Park's failure to afford plaintiff the protection of these rules (rules aimed at enhancing plaintiff's property interest in continuing employment and job security) rendered the termination improper and in violation of due process.

C. THE TERMINATION WAS IMPROPER BECAUSE IT WAS ARBITRARY AND CAPRICIOUS AND WITHOUT JUST CAUSE SO AS TO BE A SUBSTANTIVE DUE PROCESS VIOLATION.

If a decision to terminate an employee is made arbitrarily and capriciously, and/or without good cause, there is a violation of due process.

In Alexander I, the Court stated, "Where a public employee is terminated without just

cause, the question of proximate cause does not arise because the violation is so closely connected to the harm suffered." In Siu v. Johnson, 748 F.2d 238 (4th Cir. 1984), the Court indicated that evidence of personal malice, or reckless inattention to relevant materials, or comparable wholly non-profesional factors is supportive of a conclusion of an arbitrary and capricious decision in violation of due process.

In the instant case, the wholesale disregard of the personnel rules (at least ten different personnel rules were broken in the decision to terminate plaintiff, including a denial of bumping and re-employment preference rights and retreat rights plaintiff clearly had) shows a reckless inattention to relevant materials at best and personal malice at worst. Plaintiff's supervisor acknowledged he had bumping rights, but urged her boss the rights be disregarded, and plaintiff not be "saved". Mike Bedwell, the City Manager who made the decision, testified he did not offer plaintiff his bumping rights even though he knew he had them because he did not want to demean or anger him,

indicating personal malice and/or wholly non-professional factors influencing the decision to terminate. Bedwell indicated no concern about plaintiff being thrown into unemployment, or about adverse publicity and stigmatization to plaintiff which was sure to follow in the small close-knit Menlo Park/East Palo Alto community, indicating his main concern was to get rid of plaintiff in spite of the various rules mandating his retention in one capacity or another.

This arbitrary and capricious decision-making and wholesale disregard of the rules is violative of substantive due process, independent and apart from a consideration of the Loudermill pre-deprivation due process analysis set forth in Section I(B) above. It is yet an additional reason why plaintiff's termination was improper and in violation of due process.

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II. THE COURT OF APPEALS USED THE WRONG LEGAL STANDARD IN DECIDING TO CUT OFF PLAINTIFF'S ECONOMIC LOSS AFTER HIS VOLUNTARY RESIGNATION FROM HIS SUBSEQUENT JOB.

A. RESIGNATION OR TERMINATION FROM A SUBSEQUENT JOB SHOULD BE ANALYZED IN TERMS OF MITIGATION PRINCIPLES OF REASONABLENESS OF CONDUCT RATHER THAN IN PROXIMATE CAUSE TERMS OF AN INTERVENING CAUSE CUTTING OFF ALL ECONOMIC LOSS THEREAFTER.

The Ninth Circuit affirmed the trial court's decision to cut off Alexander's employment loss as of the date he went to work in the Ravenswood/East Palo Alto Director position, and to not allow him to receive economic loss for subsequent economic losses he incurred after he voluntarily resigned from that position.

The Court of Appeals held that "the district court correctly determined that termination of subsequent employment was causally unrelated to the failure to offer Alexander bumping rights, but rather was a result of proper termination, judicial decisions and publicity about the litigation."

Implicit in the Court of Appeals' opinion (and the district court's) was that Alexander voluntarily left for legitimate health reasons

(extreme stress he was suffering from the particular job of East Palo Alto Director), but that that distress was not in its opinion directly caused by the denial of bumping rights, but rather was caused by termination from employment with Menlo Park (which flowed from the bumping rights), and judicial decisions and publicity about the litigation brought to redress the denial of bumping rights and termination flowing therefrom.

In addition to wrongfully characterizing Alexander's termination from Menlo Park employment as "proper" (see analysis in section I, above), the opinion wrongfully analyzes the issue of the effect of resignation from a subsequent job on the cut-off of economic damages in a constitutional or civil rights case as exclusively a proximate cause issue instead of a mitigation issue.

In Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982), the U.S. Supreme Court held that employers who committed employment discrimination could cut off further economic loss by offering the adversely affected

employee an unconditional job offer of the same job which they had been wrongfully denied.

On the other side of the equation, there is utter confusion between and in the different Circuit Courts as to what actions by the employee (rather than actions by the employer [which the Ford Motor Co. v. EEOC decision addressed]) cut off back pay liability of the employer.

At the outset, it is clear that an employee needs to make a diligent and reasonable search for substantially similar employment after being terminated in violation of his civil rights. (See Ford Motor Co. v. EEOC, Id., at 3066-3067.)

However, once having obtained subsequent employment, it is totally confusing as to what effect on back pay loss an employee's resigning from or being involuntarily terminated from the subsequently obtained job has on his ongoing back pay loss occurring after having been unlawfully deprived of the initial job.

In the Eleventh Circuit, there is no cut-off of back pay loss if the employee resigns a subsequent job because of dissatisfaction.

(E.E.O.C. v. Guardian Pools, 828 F.2d 1507 (11th Cir. 1987).) Using this "dissatisfaction" test, Alexander's back pay loss clearly would not have been cut off by his resigning the East Palo Alto job.

In Sangster v. United Air Lines, Inc., 633 F.2d 864 (9th Cir. 1980), the Ninth Circuit held that a voluntary leaving of subsequently obtained employment in a civil rights case does not operate to limit economic damages proximately caused by a wrongful termination if the voluntary leaving was for a "good reason". The good reason did not have to be related to the civil rights or due process violation by the previous employer--it simply had to be a good reason. In Sangster, the Court cited with approval, NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2nd Cir. 1965, cert. den., 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966). In NLRB v. Mastro Plastics Corp., id., at 179, the Court held that an example of a good reason for an employee to terminate subsequently obtained employment, which would not be considered a failure to mitigate damages, would

be for reasons related to the subsequently obtained employment's effect on the employee's health. (See also, Wells v. North Carolina Bd. of Alcoholic Control, 740 F.2d 340, 342 (1983).)

Under such a "good cause" test, Alexander's resignation from the East Palo Alto Director job would not be considered a failure to mitigate damages, since it was for good cause (extreme emotional distress, a health-related reason).

In Boehm v. American Broadcasting Co., Inc., 929 F.2d 482 (9th Cir. 1991), the Ninth Circuit indicated in adopting a jury instruction that the test is whether the employee made "reasonable efforts to find or retain employment." (Emphasis added). This test is closely akin to the Sangster-NLRB v. Mastro test of whether there was "good cause" to resign from the subsequent job.

The Tenth Circuit, in Whatley v. Skaggs Companies, Inc., 787 F.2d 1129 (10th Cir. 1983) has analyzed the issue in terms which serve as a bridge between the "proximate cause" test enunciated by the Ninth Circuit in our case and the "good cause" or "reasonability" test

enunciated in Sangster, NLRB v. Mastro, and Boehm. In Whatley, the Court held that an employee's leaving subsequently obtained employment for health reasons, and thereafter going on disability, did not serve to cut off economic loss flowing from the original wrongful adverse job decision. The Court noted that plaintiff, after not obtaining a management position with the defendant, had accepted a job requiring strenuous physical labor and had suffered a back injury. The Court noted that if plaintiff had received the wrongfully denied management position, he never would have taken the subsequent job and would not have suffered the back injury (which was related to the physical nature of the subsequent job and plaintiff's response to said subsequent job's conditions).

Thus, this case presents the Supreme Court with the opportunity to bring clarity to an issue handled inconsistently and with great confusion by the different Circuit Courts (and even within each Circuit Court, such as the Ninth Circuit--compare Sangster with Boehm with

Alexander II.)

Significantly, in Ford Motor Co. v. EEOC, supra, two employees were laid off at a subsequent employer after being discriminated against by the first employer (Ford). However, their back pay loss caused by the discriminatory acts of the first employer was not cut off as of the time they were laid off. There was good reason why they did not retain the subsequent employment (layoff), just as there was good reason plaintiff did not retain his subsequent employment (resignation based on health reasons-reasons--severe emotional distress.).

B. THE COURT OF APPEALS' PROXIMATE CAUSE ANALYSIS IGNORES THE FACT THAT IN PROCEDURAL DUE PROCESS CASES, ALL INTERVENING CAUSES OF DAMAGE ARE NOT IN FACT SUPERSEDING CAUSES, BUT MAY BE SIMPLY EVENTS FLOWING FROM, AND PROXIMATELY CAUSED BY THE DUE PROCESS VIOLATION.

The Ninth Circuit opinion in this case takes the position that the damages caused by the procedural due process violation it found (denial of bumping rights) were somehow cut off by a superseding intervening cause (termination). However, the termination was not a superseding intervening cause. Rather, the violation of due process caused the termination.

(See Alexander v. City of Menlo Park, 787 F.2d 1371, 1375 (9th Cir. 1986)--"The injury suffered by plaintiff was unemployment".) Plaintiff would not have been terminated from employment if he had not been denied due process and been given his bumping rights. (Accord, Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981); Gabe v. County of Clark, supra.)

In Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Supreme Court indicated that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question..." The Court drew a distinction between damages caused by a procedural due process violation and damages caused by deprivation of a property interest the procedural due process violation concerned. The Court indicated that only if the underlying deprivation came about because of the procedural due process violation, could damages arising out of the underlying deprivation be recovered.

The application of Carey v. Piphus appears

to be creating confusion among the Circuit courts, since the analysis of procedural due process violation causing an underlying deprivation appears to have been rejected out of hand in Alexander II, supra. The Court of Appeals' analysis stopped with the distinction being made between the procedural due process violation (bumping rights being denied by Menlo Park) and underlying deprivation (plaintiff being terminated after his bumping rights were denied) without the connection being made between the two as should have been done.

This Court should address the whole issue of procedural due process violations, and when underlying economic loss arising from job loss occurring after a procedural due process violation is compensable. (See, Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985), economic harm caused by being prevented from selling T-shirts was in turn caused by denial of procedural due process violation and was accordingly compensable; Merritt v. Mackey, 932 F.2d 1317 (9th Cir. 1991) (economic losses from being terminated from employment are

compensable if person would not have been terminated if procedural due process had not been denied him). Accord, Brewer v. Chauvin, 938 F.2d 860, 865 (8th Cir. 1991).)

III. THE COURT OF APPEALS USED THE WRONG LEGAL STANDARD IN DECIDING THAT EMOTIONAL DISTRESS CAUSED BY PLAINTIFF'S TERMINATION BY PUBLICITY, AND BY JUDICIAL PROCEEDINGS BROUGHT TO REDRESS THE WRONG WAS NOT COMPENSABLE.

The trial court originally awarded plaintiff $100,000 emotional distress damages, holding that the emotional distress plaintiff sustained was "at least in substantial part proximately resulting from the denial of procedural due process".

Later, the trial court reduced the $100,000 award to $10,000, holding that 10% of plaintiff's emotional distress was from loss of bumping rights, 60% was from "termination of employment", and 30% was from "reaction to publicity and judicial decisions". The trial court indicated that the 60% of emotional distress from "termination of employment" and the 30% from "reaction to publicity and judicial decisions" was not

proximately caused by the due process violation (loss of bumping rights).

In addition to the due process violation being broader than mere loss of bumping rights (see analysis in Section I, above), even if the only due process violation was loss of bumping rights, the "termination of employment" and the "reaction to publicity and judicial decisions" would never have come about if plaintiff had been afforded his bumping rights. He would have continued to be employed at Menlo Park, and would not have been terminated. There would never have been the publicity and the judicial decisions following his termination, because the termination would not have happened.

Once again, it is clear that this Court needs to clarify its ruling of Carey v. Piphus on proximate cause in 42 U.S.C. Section 1983 cases, especially as applied to the employment context. Although emotional distress damages flowing from a substantive harm occurring after a procedural due process violation are not compensable in a 42 U.S.C. 1983 case if the substantive harm would have occurred even if due

process had been afforded, they are compensable if the substantive harm would never have come bout except for the procedural due process violation. Furthermore, Carey v. Piphus, id., clearly put the burden of proving that the damages from the substantive harm following the procedural due process violation are not compensable on the defendant, not the plaintiff.

The trial court in our case relied on Wilson v. Taylor, 658 F.2d 1021 (5th Cir. Unit B 1981, appeal after remand, 733 F.2d 1539 (11th Cir. 1984). The Court's reliance on Wilson was misplaced. In Wilson, a plaintiff was denied a hearing at first (procedural due process violation), but ultimately received one and was terminated anyway despite the hearing (procedural due process violation was cured; termination did not come about because of the procedural due process violation). Accordingly, the Court reasoned, the emotional distress arising from the termination was distinctly different and had nothing to do with the emotional distress arising from the violation of procedural due process (lack of a hearing).

However, in our case, the violation of due process caused the termination. (See Alexander v. City of Menlo Park, 787 F.2d 1371, 1375 (9th Cir. 1986)--"The injury suffered by plaintiff was unemployment".) Plaintiff would not have been terminated from employment if he had not been denied due process and been given his bumping rights. Accord, Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981) [damage to reputation and emotional distress arising as a result of termination which was unlawful because of procedural due process violation, and which termination would not have occurred if procedural due process violation did not occur, was compensable in a 42 U.S.C. Section 1983 action]; Barberic v. City of Hawthorne, 669 F.Supp.985 (C.D. Cal. 1987)[police chief who was involuntarily retired without procedural due process, and who would have been retained in employment and not been involuntarily retired if he had been afforded procedural due process, was entitled to emotional distress damages caused not only by the procedural due process violation itself but also emotional distress damages

caused by his termination (deprivation of his property interest) which would have never occurred if he had been afforded procedural due process]; Derstein v. Benson, 714 F.Supp. 481 (D.Kan. 1989) [state court services officer who would not have been discharged if he had been afforded procedural due process prior to discharge was entitled to damages for emotional distress suffered as the result of the unjustified termination].)

Similarly, the 30% of emotional distress plaintiff suffered which the trial court attributed to reaction to the judicial proceedings and publicity surrounding the termination, flowed directly from the due process violation plaintiff suffered, and should be compensable based on the proximate cause principles set forth in Carey v. Piphus, supra.

In Alexander I, the Court stated that plaintiff's property interest was "substantial--Alexander's oppportunity to continu his employment, maintain his income, and protect his reputation." For the Court to then find in Alexander II that publicity which injures

reputation is somehow not compensable seems irreconcilable with the previous opinion, especially in light of Carey v. Piphus stating that the remedy should be tailored to the interests protected by the particular right in question.

There were at least three different articles published on plaintiff's termination in the Peninsula Times Tribune, a local newspaper with wide circulation in plaintiff's community. The first article, published in 1980, quoted the City Attorney of Menlo Park stating that, "The city discharged Alexander because he did not meet the city's job performance standards." The City Attorney also was quoted as stating, "By then, we were acutely aware of the complaint he had filed with the EEOC, so we acted in the most prudent fashion possible before we fired him." This was especially distressing to plaintiff, since there had been wholesale rule violations in his termination, and he had been intentionally denied bumping, re-employment preference list, and retreat rights. Also, he had never been told that his performance in

employment in toto with the City was anything other than excellent. The second article, published in April 1983 was about the hiring of plaintiff by Ravenswood Recreation District. The article mentioned that, "Alexander currently has a lawsuit pending against City of Menlo Park resulting from his firing there in 1979 after five years of employment." Alexander was starting out on a new subsequently obtained municipal job at the time, and this adverse publicity created substantial additional distress and affected his ability to do the job adequately. The third article, published in May 1983, referred to the ongoing litigation in this case, and the headline read in part, "East Palo Alto official wants Menlo Park pay". These articles and the continuing publicity of his termination from employment, greatly stigmatized and humiliated plaintiff, and adversely affected his reputation in the community.

In Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981), the Court held that a plaintiff whose due process rights had been violated by a wrongful termination, and who had suffered general

damages from publicity surrounding the termination, was entitled to an award of general damages caused by the publicity. The due process violation caused the publicity which caused the general damages to the plaintiff. (Cf. Brady v. Gebbie, 859 F.2d 1543, 1558 (9th Cir. 1989), in which the Ninth Circuit seemed to indicate that statements published by third parties cannot form the basis of liability or damages.)

The Court should clarify whether emotional distress caused by publicity in newspapers arising out of a wrongful act is compensable under 42 U.S.C. Section 1983, or whether the newspaper articles published by a third party are considered a superseding, intervening cause of the distress arising from the publicity (as the Court of Appeals in Alexander II appears to have decided).

Significantly, in our case, top officials of the City of Menlo Park were quoted on the termination of plaintiff. Furthermore, the termination of plaintiff--not some alleged conduct he engaged in prior to his termination--

was the subject of the publicity.

Similarly, the judicial proceedings would never have come about if the due process violation had occurred, and accordingly under the principles of Carey v. Piphus, supra, emotional distress suffered pertaining thereto should also be compensable. (See also, Restatement (Second) of Torts, Section 446.)

In the case herein, the Ninth Circuit took an unduly restrictive view of proximate cause in 42 U.S.C. Section 1983 cases, and an unduly expansive view of when an event caused by the due process violation serves as an intervening, superseding cause of emotional distress damages. This case presents the Supreme Court with an opportunity to clarify the proximate cause principles in 42 U.S.C. Section 1983 cases addressed in Carey v. Piphus, supra.

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFF REINSTATEMENT RIGHTS BASED ON HIS HAVING RESIGNED FROM SUBSEQUENT EMPLOYMENT AT EAST PALO ALTO.

The trial court denied plaintiff reinstatement and/or front pay and/or vocational rehabilitation based on its legal determination that an employee is not entitled to this type of

equitable relief if he resigns from a subsequently obtained job. Such resignation, according to the trial court, cuts off not only the right to further economic compensation after the resignation, but also any right to reinstatement or front pay or vocational rehabilitation.

This legal reasoning as applied to a reinstatement remedy is perhaps even more drastic than the legal reasoning which denied any economic compensation after the resignation. Under this proposed rule, an employee who took a subsequent job and was forced to leave it a week later because of some temporary health problem, would cut off any equitable remedies such as reinstatement, front pay, or vocational rehabilitation.

When a plaintiff has been deprived of a property right without due process, which he would not have been deprived of if he had received due process, he is entitled to reinstatement in order to make him whole. Plaintiff was entitled to reinstatement to the employment he was deprived of because of the

denial of his due process rights. (See, e.g., Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973); Abbott v. Thetford, 529 F.2d 695 (5th Cir. 1976) ["...(T)he Courts have established the principle that reinstatement is a necessary element of an appropriate remedy in wrongful employee discharge cases (citations)."]

The trial court's reasoning turns the make whole remedy on its head. If an employee can be denied desperately needed equitable relief because he voluntarily resigned an interim job for good reason, the make whole remedy simply is no longer viable.

The importance of not allowing the chipping away of the reinstatement remedy in this fashion cannot be overemphasized. Reinstatement is a unique type of relief. An award of back pay and benefits cannot make up for career loss, loss of seniority, present job security, stigmatization from loss of job, and gaps in a career on an employment resume, where as reinstatement and/or ordering the process due can address such difficult-to-calculate losses.

In Hansard v. Pepsi-Cola Metropolitan

Bottling Co., 865 F.2d 1461 (5th Cir. 1989), the Court cut off back pay loss for failure to mitigate in March 1984 and thereafter; however, the Court remanded the case because the trial court in July 1986 failed to consider the issue of reinstatement. (See also Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986), in which the Court found plaintiff entitled to reinstatement/front pay rights even though she had quit subsequent employment.)

The Ninth Circuit in its 1991 decision dodged the issue of reinstatement the trial court had ruled upon. The Ninth Circuit stated Alexander "abandoned" his reinstatement claim because he hadn't raised it on his first appeal. It ignored the fact the trial court, after remand from the first appeal, found the issue no longer moot because Alexander was no longer working, took considerable evidence on the issue, and made an actual finding on the issue. (See Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990); Quern v. Jordan, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148 n. 18, 39 L.Ed.2d 358 (1979) ["'While a

mandate is controlling as to matters within its compass, on the remand, a lower court is free as to other issues.' (Citations.)."")

Alexander II also ignored the whole nature of equitable relief--that what type of equitable relief should be awarded and when it is appropriate changes throughout a case as a person's circumstances change. Equitable relief is adopted to the situation to alleviate the situation contemporaneously. Plaintiff, after remand, had experienced a number of years of unemployment and underemployment, and equitable relief of reinstatement was suddenly very important to make him whole (which it had not been when he was working immediately prior to the appeal). Reinstatement can be brought up and decided at any point in time by a trial court in a civil rights proceeding--before an appeal, after an appeal, or even aftr a judgment is entered after appeal. (See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263-264 (5th Cikr. 1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970); Brown v. Gaston County Dyeing Machine

Co., 457 F.2d 1377, 1383 (4th Cir. 1972).

The Court should clarify the whole issue of reinstatement and when it should be awarded in due process cases. Reinstatement (or its alternative remedies of front pay or vocational training) is an extremely important part of making a 42 U.S.C. Section 1983 plaintiff whole. This remedy should not be undermined by an overly strict law of the case ruling (especially when the trial court after remand took new evidence on the issue, made a finding on it, and felt it to be a germane issue). Nor should such an important make-whole remedy be disallowed because of a decision by a plaintiff to resign a subsequent job (however short the job was and however good the reason was to resign).

V. THE COURT ERRED IN AFFIRMING THE AWARD OF PREJUDGMENT INTEREST

Prejudgment interest in a civil rights case is a highly important element of relief because of the length of time these proceedings often take to litigate. (See Ford Motor Co. v. EEOC, supra, at 3060, 3064--extremely adverse effects of delays in litigation on civil rights victims

and their families in employment cases, and importance in fashioning remedy taking into account the delays.) The different circuits have adopted very different standards on what methodology to use in determining the amount of prejudgment interest. Because of the huge delays in litigation on these types of cases, the difference in computation methodology can cause differences in result running into the tens of thousands of dollars.

In the instant case, the Court did not use the T-bill rate set forth in 28 U.S.C. Section 1961 (the methodology used for post-judgment interest computation), which would have locked in the T-bill rate in effect at the time of the loss up to the date of judgment. Rather, the Court used a rate varying yearly as interest rates continued to vary. The problem with not locking in the rate was plaintiff had taken out a loan at the time of his loss locking in the high rate on the debit side. However, on the credit side, he received in the judgment the much lower rates which came into effect as the years passed and the rates moved downward.

Other circuits have used a methodology leading to an even higher rate than the 28 U.S.C. Section 1961 post-judgment interest computational methodology. They have looked at prejudgment interest in terms of the cost of borrowing money at the prime rate, which would be significantly higher than the 28 U.S.C. Section 1961 T-bill rate (which is an investor's rate, not a borrower's rate). (See Alberti v. Klevenhagen, 896 F.2d 927 (5th Cir. 1990). Since plaintiff in fact borrowed approximately the amount of his economic loss, such a borrower's rate would seem to be even more appropriate in the instant case.

VI. THE COURT ERRED IN NOT AWARDING PUNITIVE DAMAGES.

The Court never got to the punitive damages issue, holding that Mike Bedwell was never found liable by the trial court, and the issue was not appealed in the first appeal.

However, plaintiff appealed all grounds against both defendants (the City of Menlo Park and Bedwell) in his opening brief in the first appeal. Furthermore, the Ninth Circuit in its decision in Alexander I, supra, at 1375 clearly

held that, "Alexander proved the defendants violated his due process rights by failing to inform him he could bump into either of two positions." (Emphasis added).

Punitive damages for deprivation of civil rights against an individual City official should be awarded when the defendant wilfully and intentionally violates another's civil rights or when the defendant acts with reckless or callous indifference to the federally protected rights of others. Smith v. Wade, 461 U.S. 30, 1903 S.Ct. 1625, 75 L.Ed.2d 6232 (1983).

Defendant Bedwell testified that he knew plaintiff had bumping rights, but he did not want to "demean" or "insult" plaintiff by explaining to him his bumping rights (to a lower position). It is difficult to understand this rationale, since the alternative he chose was to cause plaintiff to be thrown totally out of work, into unemployment and financial deprivation, without explanation.

Bedwell's self-stated rationale falls apart eveen further when one examines a series of

intentional acts showing reckless and callous indifference to plaintiff. For example, Bedwell testified plaintiff's only bumping rights were to Gym Director or Night Clerk, two of the lowest paid positions in the City, whereas the personnel rules (Rule X, Section 3(E)) clearly spelled out that plaintiff, if he was being laid off, had a right to be retained in the highest possible salary. Furthermore, Bedwell did not put plaintiff on the re-employment preference eligibility list, as he was entitled to be, in which plaintiff would have become eligible for a number of highly paid jobs over the ensuing two years. Other acts showing a reckless and callous indifference to plaintiff have been set forth, above, in the Factual Background section.

VII. CONCLUSION

The petition for writ of certiorari should be granted for all of the above-stated reasons.

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